BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

GARVEY ELEVATORS, INC., Appellant, vs. ADAMS COUNTY BOARD OF EQUALIZATION, Appellee.	)	CASE NO. 98C-1 FINDINGS AND ORDERS

Filed February 8, 2000

Appearances:

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Before: Commissioners Edwards, Hans and Reynolds

Reynolds, Chairman, for the Commission

SUMMARY OF DECISION

The Commission affirms the decision of the Adams County Board of Equalization which granted Taxpayer's protest in part, and denies Taxpayer's request for a further reduction in the assessed value of the subject property.

NATURE OF THE CASE

Garvey Elevators, Inc. ("Taxpayer") owns two parcels of commercial real property located in Adams County, Nebraska. The Adams County Assessor ("Assessor") proposed valuing the improved parcel in the amount of $1,965,375 as of the assessment date, and further proposed valuing the unimproved parcel in the amount of $72,415. Taxpayer filed a protest with the Adams County Board of Equalization ("County") alleging that the proposed value of the property exceeded the actual or fair market value and further that the proposed value was not equalized with comparable property. Taxpayer alleged before the County that the property is under the scrutiny of the Nebraska Department of Environmental Quality ("NDEQ") due to carbon tetrachloride contamination. By way of relief, Taxpayer requested that the proposed 1998 valuation for both parcels be reduced to zero. The County granted the protest in part, and determined that the actual or fair market value of the improved parcel as of the assessment date was $1,000,000, from which decision Taxpayer appeals. For reasons set forth below, it appears that the Taxpayer protested the value of the vacant parcel, but that the protest was denied. The record would indicate that the County determined that the actual or fair market value of the vacant parcel was $72,415, from which decision Taxpayer appeals.

EVIDENCE BEFORE THE COMMISSION

The Commission took notice of the following documents as authorized by Neb. Rev. Stat. §77-5016 (5) (1999 Supp.) without objection: the Commission's case file for Case No. 98C-1; the Tax Equalization and Review Commission brochure; the Nebraska Constitution; the Nebraska State Statutes and amendments to those statutes; 1999 Neb. Laws. L.B. 140; 1999 Neb.

Laws L.B. 36; 1999 Neb. Laws L.B. 194; *Title 442, Nebraska Administrative Code* (the Tax Equalization and Review Commission's Rules and Regulations); *Title 298, Nebraska Real Estate Appraiser Board Rules and Regulations (1995); Title 114 through and including Title 124, Title 126 through and including 136 and Title 194 through and including Title 200 , Nebraska Administrative Code,* (the rules and Regulations pertaining to the Nebraska Department of Environmental Quality); the Property Tax Administrator's Published *1998 Ratios and Measures of Central Tendency* (published pursuant to Neb. Rev. Stat.§77-1327(6))*; the 1998 County Profiles for Adams County;* the Property Tax Administrator's *1998 Statistical Measures*; the 1998 Assessor's Interviews by the Property Tax Division; the 1998 Qualified Sales Report Profiles; the *1999 Formal Plan of Equalization*; the 1998 *Statewide Equalization Proceedings*; the Nebraska Real Estate Appraiser Board Certification Requirements; the Nebraska Real Estate Appraiser Board Education Core Curriculum; *Nebraska Economic Data* BIN/Nebraska Department of Economic Development (1998); the *Marshall Valuation Service;* the *Marshall Valuation Service* Historical Information; the *Nebraska Assessor's Reference Manual (Volumes 1 and 2)*; three standard reference works published by the International Association of Assessing Officers: *Property Assessment Valuation, Second Edition* (1996); *Property Appraisal and Assessment Administration* (1990); and *Glossary for Property Appraisal and Assessment* (1998); the Soil Survey for Adams County; the *Uniform Standards of Professional Appraisal Practice (1999)*; and 42 U.S.C. § 9601 and related statutes.

The Commission also received certain exhibits and testimony during the course of the hearing.

I.
ISSUES BEFORE THE COMMISSION

Neb. Rev. Stat. §77-1502 (1998 Cum. Supp.) requires a taxpayer to identify the issues to be presented to the County Board of Equalization. The Commission's jurisdiction is limited to those issues presented to the County Board of Equalization and those issues sufficiently related in content and context to be deemed the same question at both levels. *Arcadian Fertilizer v. Sarpy County Bd. of Equal.*, 7 Neb. App. 499, 505, 583 N.W.2d 353, 357 (1998). The issues before the Commission are, therefore, Taxpayer's allegations that:

> ". . . the subject property is: (1) valued in excess of its actual value; (2) is not equalized with comparable properties in Adams County; (3) contaminated and subject to a remedial action plan and federal and state environmental supervision and regulation; (4) not assessed uniformly and proportionately; and (5) not generating any income and has no market value in its current contaminated state."

(Appeal Form).

II.
FINDINGS OF FACT

The Commission, in determining cases, is bound to consider only that evidence which has been made a part of the record before it. No other information or evidence may be considered. Neb. Rev. Stat. §77-5016(3) (1999 Supp.). The Commission may, however, evaluate the evidence presented utilizing its experience, technical competence, and specialized knowledge. Neb. Rev. Stat. §77-5016(5) (1999 Supp.).

From the pleadings and the evidence contained in the record before it, the Commission finds and determines as follows:

A.
PROCEDURAL FINDINGS

1. That Taxpayer is the owner of record of two parcels of commercial real property located in Adams County, Nebraska ("subject property").

2. That neither Party made the Notice of Valuation Change Form for tax year 1998 a part of the record for either parcel.

3. That the Taxpayer alleged that the County Assessor ("Assessor") proposed valuing the improved parcel for purposes of taxation in the amount of $1,965,375 as of January 1, 1998 ("assessment date"). (E1). That however, the Property Record Card for this parcel (Exhibit 15) demonstrates that, prior to the 1998 change by the County Board, the Assessor proposed valuing the land component in the amount of $114,265, and the building component in the amount of $1,757,520, for a total of $1,871,785. (E15:1). That nothing in the record explains the difference between the $1,965,375 alleged as the Assessor's value by the Taxpayer, and the $1,871,785 shown on Exhibit 15, page 1. (The difference is $93,590, which is *not* the proposed value of the vacant parcel of land.)

4. That Taxpayer timely filed a protest of the proposed valuation of the improved parcel, and requested that the subject property be valued at zero. (E1).

5. That the County granted the protest in part, and determined that the assessed value of the improved parcel as of the assessment date was $1,000,000. (E1).

6. That Exhibit 1, in the block entitled "County Board's Determination for Assessment Year 1998," shows that the County increased the land value to $119,980 for the improved parcel. (E1). That the improvement value was reduced to $880,020. (E1).

7. That thereafter, the Taxpayer timely filed an appeal of the County's decision to the Commission. (Appeal Form).

8. That the evidence received indicates that the Taxpayer protested the Assessor's proposed value of $72,415 for vacant parcel for tax year 1998. (E4). That however, this evidence (Exhibit 4, page 1), unlike Exhibit 1, does not bear a "Filed Date"or the "Signature of the County Clerk" in the upper right hand corner as does Exhibit 1. Furthermore, there is no information in the "Names of Witnesses and Summary of Testimony of Each" block, as required by Neb. Rev. Stat. §77-1502 (1998 Cum. Supp.). There is no information in the blocks labeled "County Assessor's Recommendation," or "County Board's Determination for Assessment Year 19__," and finally that the form is not signed by any of the members of the County Board of Equalization.

9. That the County's Exhibit 15, page 5, is a duplicate of Taxpayer's Exhibit 4, page 1. That Exhibit 15, page 5, however, does bear a "Filed" date of June 16, 1998. That this Exhibit also bears the signature in the block labeled "Signature of County Clerk." That this Exhibit however, like Exhibit 4, page 1, bears no information in the "Names of Witnesses and Summary of Testimony of Each" block, as required by Neb. Rev. Stat. §77-1502 (1998 Cum. Supp.). That further there is no information in the blocks for "County

Assessor's Recommendation," or "County Board's Determination for Assessment Year 19__", and finally the form is not signed by any of the members of the County Board of Equalization.

10. That neither Party made the transcript of the proceedings before the County a part of the record.

B.
SUBSTANTIVE FINDINGS AND FACTUAL CONCLUSIONS

1. That the Taxpayer's two parcels of land are described as follows:

   a. The first parcel, hereinafter the "improved parcel" is described as the N ½ N & W of RR Except. 23 - 7 - 10 Denver TWP, known as Elevator Site & Highway Frontage, in Section 23, Township 7, Range 10, consisting of approximately 22.09 acres, in Adams County, Nebraska. (E15:1). That this parcel includes certain improvements. That the Assessor proposed valuing the improvements in the amount of $1,757,520, and the land component in the amount of $114,265, for a total of $1,871,785. (E15:1).

   b. The second parcel, hereinafter the "vacant parcel," is described as the N ½ N & W of RR with Except. 23 - 7 - 10 Denver TWP, Excludes Elevator Site, in Section 23, Township 7, Range 10, consisting of approximately 83.82 acres, in Adams County, Nebraska. That this parcel is vacant land. That the Assessor classified the land as "agricultural land" and proposed valuing the land in the amount of $72,415. (E16:1; E16:4).

c. That the two parcels are jointly referred to as the subject property.

2. That the improvements to the "improved parcel" consist of an approximately 8 million bushel capacity grain elevator terminal. (E12:5). That this elevator terminal includes a concrete elevator head house with a total of 258 bins and 4,733,000 bushels of storage capacity. That this concrete elevator has a head house with two legs in the house that can handle 25,000 bushels per hour, and 2 legs outside which can handle 7,000 bushels per hour. That the improvements also include a steel tank with storage capacity of approximately 818,000 bushels; a flat storage building with a capacity of approximately 2,500,000 bushels; and certain other improvements. (E2:5).

3. That the subject property has rail service from two railroads: Burlington Northern and Union Pacific. That the grain elevator terminal has 4,600 feet of onsite rail trackage which may be used to load 54-car unit trains serviced by these two railroads. (E2:4 - 5).

4. That carbon tetrachloride was used as a grain fumigant at the grain elevator until the mid-1980's. That the Federal Environmental Protection Agency banned the use of carbon tetrachloride at that time.

5. That Ag Processing, Inc., ("the Grain Co-op") offered to purchase 30 grain elevators from the Taxpayer in the early 1990's, subject to an Environmental Site Assessment for each.

6. That the Grain Co-op acquired 27 grain elevators from the Taxpayer. That the Grain Co-op did not purchase 3 of the grain elevators after an Environmental Site Assessment was performed on those sites.

7. That the Grain Co-op requested a Phase I Environmental Site Assessment of the subject property. That the report was completed in two phases, one on May 9, 1994 (without the

chemical results of water samples) and one on May 23, 1994, which included the results of the water sample testing. (E13:Appendix A, p. 14).

8. That as a result of the water sample testing, "[t]he laboratory report indicated the tap water sample contained 199 micrograms per liter of Carbon Tetrachloride." (E13: Appendix A; Addendum, p. 1).

9. That Title 118, Nebr. Admin. Code, Chapter 4, Section 002, provides that the "Maximum Contaminant Levels" for Carbon Tetrachloride is "0.005 mg/l."

10. That one microgram (abbreviated "ug") is one-millionth of a gram, and that one milligram (abbreviated "mg") is one thousandth of a gram. That therefore .005 milligrams is equal to 5 micrograms.

11. That the Taxpayer contracted with a Consulting Group ("the Consultant") to complete an "investigation to determine the occurrence of carbon tetrachloride in soils and groundwater in the vicinity of the elevator, evaluate remedial alternatives, and to estimate the costs of the remedial action." (E13:7).

12. That following discovery of the presence of carbon tetrachloride, a total of 36 wells were sunk to identify the outlines of the "downgradient plume," i.e., the extent of groundwater contamination. (E13:20).

13. That the "vadose zone" is "the zone between the ground surface and the water table." (E13:19). That although carbon tetrachloride use stopped in the mid-1980's, "Carbon tetrachloride adsorbed to the soils may continue to leach into the aquifer." (E13:25).

14. That the maximum concentration of carbon tetrachloride measured in the soil was 994 ug/kg. (E13:26 - 27).

15. That the total dimensions of the dissolved carbon tetrachloride in groundwater ("the downgradient plume") were found to be approximately 8,000 feet long and 3,000 to 4,000 feet wide, and its average thickness was found to be approximately 30 - 50 feet long according to a report dated October, 1995. (E13:19). That according to a report dated February, 1996, the dissolved plume of carbon tetrachloride in groundwater was found to be approximately "6,500 feet long by 3,200 feet wide in the principal regional sand and gravel aquifer." (E12:4).

16. That some of the soil and some of the groundwater beneath the subject property is therefore "contaminated."

17. That no evidence has been adduced to establish that the buildings on the subject property are "contaminated."

18. That the Taxpayer's treasurer testified that as of January 1, 1998, the Taxpayer had not started remediation efforts.

19. That the Taxpayer offered into evidence four letters. That considering these letters in date order, Taxpayer's Exhibit 10 is from the Nebraska Department of Environmental Quality ("the NDEQ") to the Taxpayer with a date of January 19, 1996. That this letter refers to a proposed plan of remediation dated November, 1995. That this letter primarily deals with issues concerning remediation for the downgradient plume. That the only reference contained in the letter which might be construed to refer to the soil contamination is a statement that "Approval can be granted in the RAPMA Program for *source control* and limited remediation of the groundwater plume emanating from the

Garvey elevator site." (Emphasis added.) The letter specifically requests that the proposed plan of remediation be revised and re-submitted for NDEQ approval. (E10:1).

20. That the next letter, in date order, is Exhibit 8, dated February 26, 1996. It is from an employee of a company which has an Environmental Services Unit, and is addressed to the NDEQ. The letter indicates that NDEQ did not approve of the groundwater remediation plan submitted in December, 1995. The letter is silent as to whether the NDEQ would approve the soil remediation portion of the plan. (E8).

21. That the next letter, again in date order, is Exhibit 11, a letter from the NDEQ dated March 22, 1996. That this letter approved the "proposed work plan" submitted March 5, 1996, for "only the source area." That the letter specifically notes that "Garvey Elevators Inc. will need to address the downgradient groundwater plume whether or not the RAPMA program is used." (E11).

22. That Taxpayer's Exhibit 9 is a copy of an unsigned letter dated June 5, 1998. That this letter references a February, 1996 proposed plan. That all of the references to the remediation plan involve proposals for groundwater remediation. (E9).

23. That these letters establish that the Taxpayer has submitted proposed remediation plans to the NDEQ. That these proposed remediation plans seek to address both soil and groundwater contamination. That the NDEQ, as of 1998, specifically declined to approve the groundwater remediation plan, but had approved the soil remediation plan.

24. That based on the entire record, and for the purposes of deciding this matter, Exhibit 12 is the final approved work plan for remediation of soil contamination ("the Soil Remediation Plan") of the subject property.

25. That the projected 5-year total cost of remediation for both soil and groundwater treatment under this plan is $2.3 million. (E12:5).

26. That in order to demonstrate the impact of contamination on the actual or fair market value of the subject property, Taxpayer offered a Summary Appraisal Report as evidence of actual or fair market value of the subject property. (E2).

27. That the Parties stipulated at the hearing before the Commission that the Taxpayer's Appraiser, the author of the Summary Appraisal Report, was an expert witness.

28. That the Taxpayer's Appraiser is a Member of the Appraisal Institute holding an MAI designation and is a Nebraska Certified General Appraiser. That the Taxpayer's Appraiser testified that he has appraised 12 to 24 grain elevators in the last three years.

29. That Taxpayer's Appraiser testified that he has not appraised any contaminated properties. That Taxpayer's Appraiser testified that he has not taken any classes on the assessment of contaminated properties. That Taxpayer's Appraiser testified that he became familiar with the International Association of Assessing Officials ("IAAO") Standard on the Valuation of Property Affected by Environmental Contamination (E5) to start the appraisal of the subject property. That Taxpayer's Appraiser testified that this was his first exposure to valuation of contaminated properties.

30. That the Commission determines that the Taxpayer's Appraiser is not qualified as an expert as to the valuation of contaminated properties, or the effects of contamination on the valuation of properties.

31. That the Summary Appraisal Report addressed the subject property and the vacant parcel as a single unit and did not attribute value to each of these parcels individually in its final

determination of value. (E2:4). That the Summary Appraisal Report concludes that the value of the subject property is zero. (E2:43).

32. That Taxpayer's Appraiser utilized the remediation costs set forth in Exhibit 12 in his analysis of the effect of the contamination on the value of the property. That, however, there are differences between the costs used by the Taxpayer's Appraiser and those contained in the Soil Remediation Plan. (E12:25; E2:46).

33. That the Taxpayer's Appraiser indicates that "On-Site Remediation" will require 10 years and $2,334,000, and that "Offsite Downgradient Treatment" will require 5 years and $2.5 million, for a total of approximately $4,214,210. (E2:42).

34. That these assumptions are not supported by the Soil Remediation Plan. That the Soil Remediation Plan specifically states that the Plan only addresses a 5-year period. (E12:4). That the Soil Remediation Plan establishes a total cost for the 5-year plan of $2.3 million. (E2:46).

35. That the Taxpayer's Appraiser had prepared a substantially different Restricted Appraisal Report for submission to the County. (E17). That in this Exhibit the Taxpayer's Appraiser's final opinion of value is $410,000. (E17:11). That this Restricted Appraisal Report alleged that the costs of remediation were $3,262,000, and that $80,000 for insurance should also be included in those costs. (E17:8). That under this Restricted Appraisal Report, the Taxpayer's Appraiser estimated the Net Cash Flow to be $290,860 for each year after the first year. (E17:9).

36. That in the Summary Appraisal Report, the Taxpayer's Appraiser estimated Net Cash Flow to be a negative $121,140 for years 2 through 6, and a positive $378,860 thereafter. (E2:43). That no mention of the $80,000 appears in this Summary Appraisal Report.

37. That in both of Taxpayer's Appraisals, all of the capital costs are deducted in the first year, and all of the costs are deducted from the determination of actual or fair market value on a dollar-for-dollar basis.

38. That the Taxpayer's Appraiser alleges that he familiarized himself with the IAAO Standard on the Valuation of Property Affected by Environmental Contamination ("the Standard"). (E5).

39. That the Taxpayer's Appraiser's final opinion of value does not comply with the Standard.

40. That although the two appraisal reports arrive at different final determinations of value of the subject property as of the assessment date, both of these appraisal reports arrive at an "uncontaminated" value of $1,900,000 for the subject property as of the assessment date (E2:41, E17:8).

41. That, however, the Restricted Appraisal Report concludes that the actual or fair market value was $410,000 for the subject property as of the assessment date. (E17:9)

42. That Exhibit 17 utilizes only the costs set forth in the Soil Remediation Plan. (E17:9). That, however, these costs are "amortized" over a ten-year period. (E17:9).

43. That the Summary Appraisal Report also utilizes the costs set forth in the Soil Remediation Plan with a reduction in the annual maintenance costs. (E12:25; E17:9).

Exhibit 2 also utilizes Offsite Downgradient Treatment costs over a five year period. (E2:42).

44. That Taxpayer's Appraiser testified that he did not know where he arrived at the Offsite Downgradient Treatment costs, noting that they were not in the engineering reports.

45. That the Taxpayer's Appraiser's opinions of the impact of the carbon tetrachloride contamination on the actual or fair market value of the subject property are not credible.

46. That subject property is in use as a grain elevator terminal, and has a "value in use" for its owner or operator.

47. That the Taxpayer and the Grain Co-op have entered into a "Put Through Agreement," ("Agreement"). (E3:8). That this Agreement conveys the use of the subject property and the vacant parcel to the Grain Co-op. That in return for this use, the Grain Co-op pays a "fee equal to three-quarters of one (.75) cent per bushel of grain loaded out" by Taxpayer. (E3:1 - 2). That the minimum "fee" is $10,833.33 per month, and this amount is automatically paid to Taxpayer on or before the first of each calendar month. That an additional "fee" of three-quarters of one (.75) cent per bushel of grain loaded out is paid at the end of the year if the number of bushels "loaded out" exceeded 17,333,333 bushels in that year. (E3:2).

48. That the Grain Co-op is also required to pay Taxpayer for certain "reasonable Operating Costs" incurred by Taxpayer. (E3:3). That the Taxpayer admitted during cross-examination that "reasonable Operating Costs" include the costs of salaries and benefits for all employees working at the grain elevator.

49. That the Grain Co-op is also required to pay Taxpayer $61,211.27 at the execution of the Put Through Agreement for "reimbursement for improvements made upon the Property by" Taxpayer.

50. That the term of the Agreement is five years. (E3:1). That there are provisions for five one-year extension periods in the Agreement. (E3:5).

51. That the Agreement also incorporates a purchase option. The Agreement provides that the Grain Co-op, at any time during the life of the Agreement, may purchase the property for $1,700,000. (E3:5). That nothing in the Agreement alleges that this purchase price be offset by any of the other payments.

52. That all payments made to the Taxpayer for the "put through" of grain, feeds and/or other commodities are subject to an Escrow Agreement. (E3:2). That the Escrow Agreement provides that "This Agreement shall not be effective unless or until the closing occurs under the Purchase Agreement." (E6:1). That no "Purchase Agreement" for the subject property has been made a part of the record. That the Commission therefore infers that the purchase referred to is the purchase of the 27 grain elevators by the Grain Co-op from the Taxpayer. That these proceeds from the Put Through Agreement and the Purchase Agreement are to be utilized for remediation of the contaminated subject property and vacant parcel. (E6:2).

53. That the Purchase Agreement offered as Exhibit 7 concerns the sale of certain real estate by the Taxpayer to the Grain Co-op. That this real estate includes the six smaller feeder elevators that use the subject property grain elevator terminal at harvest time. That the subject property is not included in that Purchase Agreement.

54. The subject property is not freely transferable by Taxpayer under the Put Through Agreement. (E3).

55. That the subject property is an integral part of the Grain Co-op's operations since the subject property handles grain from six elevators belonging to the Grain Co-op which were previously owned by Taxpayer. (E7).

56. That for the purposes of this decision, although the Taxpayer never described it as such, the Put Through Agreement functions as a lease of the subject property from the Taxpayer by the Grain Co-op.

57. That the "market rent" for grain "put through" a grain elevator is from $.05 to $.10 per bushel according to the Taxpayer's own expert. (E2:35). That as noted above, the rent actually charged under the Put Through Agreement is $.0075 per bushel. That therefore "market rent" is between 15 and 75 times as much as is paid under the Put Through Agreement. That therefore the rent paid by the Grain Co-op has already been substantially discounted due to the contamination.

58. That as noted above, the Taxpayer's treasurer testified Taxpayer originally owned more than 30 grain elevators. That Taxpayer has sold all but three of the locations. That these three unsold locations, including the subject property, are contaminated. That no evidence of the actual or fair market value of the other two contaminated properties was made a part of the record.

59. That as also noted above, Taxpayer's Appraiser determined that the unimpaired value of the subject property is $1,900,000 in both Appraisals. (E2:41; E17:8). That the Assessor

determined that the unimpaired value of the subject property was $1,944,200. (E15:1; E16:1).

60. That the County reduced the actual or fair market value of the improved parcel by $965,375 to account for the contamination. (E1).

61. That therefore, from the record before it, the Commission finds and determines that the actual or fair market value (including the effect on value of the contamination) as of the assessment date was $1,000,000 for the improved parcel.

62. That the Property Record Card for the vacant parcel demonstrates that the County's final determination of value for the vacant parcel was $72,415. (E16:1). That the Commission finds and determines that the actual or fair market value of the vacant parcel as of the assessment date was $72,415.

63. That therefore the assessed value of the subject property for tax year 1998 as determined by the County is supported by the evidence.

64. That insufficient evidence has been adduced to establish that the decision of the County was unreasonable or arbitrary.

65. That therefore the decision of the County must be affirmed.

III.
ANALYSIS

A.
ISSUES BEFORE THE COMMISSION

The Taxpayer filed a protest with the County as shown in Exhibit 1. Attached to the Protest was a two-page letter, which alleged 9 different reasons for the protest. (E1:2 - 3). When

the Taxpayer appealed the County's decision to the Commission, four grounds for appeal were alleged:

> ". . . the subject property is: (1) valued in excess of its actual value; (2) is not equalized with comparable properties in Adams County; (3) contaminated and subject to a remedial action plan and federal and state environmental supervision and regulation; (4) not assessed uniformly and proportionately; and (5) not generating any income and has no market value in its current contaminated state."

(Appeal Form).

"Comparable properties" are defined as those properties which share certain elements: overall quality; architectural style; age; size; amenities; functional utility; and physical condition. *Property Assessment and Valuation, 2nd Ed., p. 98.* Taxpayer, in order to utilize comparable properties as evidence of value, must produce copies of the Property Record Cards for those properties. (Order for Hearing, at p. 3.) These Property Record Cards contain the information upon which a determination of comparability may be made. (See, e.g., Exhibits 15 and 16). Taxpayer adduced no evidence of comparable properties in Adams County.

Taxpayer's Appraiser, in both of his Appraisals, made reference to the sale of seven grain elevators. These grain elevators are located in Dodge County, Nebraska; Dakota County, Nebraska; Lancaster County, Nebraska; Platte County, Nebraska; and Council Bluffs, County, Iowa. (E2:33; E17: 7). Although the Appraiser has testified before the Commission on a number of occasions, no Property Record Cards for these properties were included in the Appraisal

Reports. Furthermore, there is no evidence that the value of any of these properties is affected by the presence of carbon tetrachloride.

The record in this case does not support Taxpayer's allegations that the value of the property is not equalized with comparable properties in Adams County, or the allegation that the property is not assessed uniformly and proportionately. The record before the Commission establishes that the only viable issue before the Commission is the actual or fair market value of the subject property as of the assessment date.

B.
TAXPAYER'S BURDEN

Taxpayer's allegation that the assessed value of the subject property is in excess of the actual or fair market value of the subject property must be considered in light of the burden of persuasion. That burden has been enunciated by the Nebraska Supreme Court in *U.S. Ecology, Inc. v. Boyd County Bd of Equalization*, 256 Neb. 7, 588 N.W.2d 575 (1999), as follows:

> ". . . [t]here is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the

> evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board. In rebutting the aforementioned presumption, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment." *Id* at 15, 581 (Citations omitted).

The Commission considers the evidence contained in the entire record before it in light of this standard.

C.
THE VALUATION
OF CONTAMINATED PROPERTY

The valuation of contaminated property for purposes of *ad valorem* taxation appears to present a case of first impression in the State of Nebraska. Although novel here, other states and even foreign countries have been compelled to address the issue. Fortunately, there is no shortage of written materials which address the issue, and there is an abundance of case law on the topic. These materials establish that there are two professionally accepted valuation methodologies for contaminated property. Under the first and preferred method, the unimpaired

value of the property is determined, and then the costs of remediation must be accounted for. The second approach requires a determination of the so-called "value in use."

The first methodology is almost universally recognized.

> "The starting point for determining market value for properties affected by contamination is the unencumbered, or unimpaired value. This is the value that property would have if no adjustment were made for any environmental problems. Unencumbered value is obtained using standard appraisal methods. Having arrived at an unencumbered value, the appraiser considers costs to correct or control environmental problems as a deduction."

Assessment Journal, March/April 1996, Vol. 3, No. 2, *Milwaukee's Environmental Contamination Standards*, p. 46. The Courts which have considered the issue vary in their approach as to which of the professionally accepted mass appraisal methodologies should be used to determine the unimpaired value. *See Reliable Electronic v. Board of Assessors of Canton,* 410 Mass. 381, 573 N.E.2d 959, 960 (1991); *B. P. Oil Inc. v. Board of Assessment Appeal of Jefferson County,* 633 A.2d 124 (1993); *Roden v. Estech,* 508 So.2d 728 [Fla. App. (2d Dist.) 1987; *Houdaille Holdings Corp.* v. *Wabasha County,* Docket Nos. C-89-661, C-89-782, and C5-90313, Minnesota Tax Court, 1991; *Appeal of Camel City Laundry Co.*, Docket No. 91 PTC 24, North Carolina Property Tax Commission, 1995); *Firestone v. County of Monteray, 223* Cal.App.3d 382, 272 Cal. Rptr. 745, 751-752 [6th Dist. 1990]). The cases clearly establish however, that this methodology is the preferred manner of determining the impact of contamination on the actual or fair market value of real property. The IAAO Standard on the

Valuation of Property Affected by Environmental Contamination ("the Standard") also demonstrates that this is the preferred methodology. (E5:13).

A problem arises if professionally accepted mass appraisal methodology cannot be used to determine the unimpaired value of the property. Salt Lake County, Utah, is one assessing jurisdiction with considerable experience in the valuation of contaminated properties. The County has at least 17 contaminated sites, and has determined that the principle of "value in use" may be used to determine the value of contaminated property. *1997 Conference Proceedings, International Association of Assessing Officers*: International Conference on Assessment Administration: *Not In My Back Yard,* Tim W. Noyce, CAMA Division Administrator, Salt Lake County Assessors Office, Utah, p. 213. The term "value in use" may be defined as "The value of property for a specific use. The concept that holds value to be inherent in property itself, that is, the value is based on the ability of the asset to produce revenue through ownership." *Glossary for Property Appraisal and Assessment,* IAAO, 1997, p. 153.

The principle of "value in use" must be distinguished from the principle of "value-in exchange." "The concept of value in use rests on the objective premise that value is within the object itself. . . . When a property is utilized at its highest and best use, its value in use and its value in exchange are the same. The value in exchange accentuates the subjective element and holds that value is within the mind of man . . . In an economic sense, the primary concern for the assessor is value in exchange because its indicates the actions and reactions of buyers, sellers, and investors." *Property Assessment Valuation, 2nd Ed.,* p. 16. Since the Taxpayer's Appraiser determined that the highest and best use of the subject property is as a grain elevator (E2:5) the value in use and value in exchange for the subject property are the same. The Standard also

recognizes the value-in-use approach as an acceptable methodology for the determination of the impact on actual or fair market value of contamination. (E5:10).

In this case, the Parties have determined that the unimpaired value of the subject property is approximately $1.9 million. (E2:41; E17:9; E15:1; E16:1). The Commission, under these circumstances, need only determine whether the costs of remediation have been properly accounted for. The burden of persuasion, however, remains on the Taxpayer.

D.
COSTS OF REMEDIATION

Professionally accepted mass appraisal methods clearly hold that fully deducting costs to correct or control environmental problems from the unimpaired value may overstate value loss. (E5:10). See also *Assessment Journal,* March/April 1996, Vol. 3, No. 2, *Milwaukee's Environmental Contamination Standards*, p. 46.

The problem which arises when clean up costs are simply deducted from the unimpaired is that a negative value may result, particularly if those costs are not properly amortized. Such a value is not credible where the property has value in use. The problem was considered by the New Jersey Supreme Court, in *Inmar Associates, Inc. v. Borough of* Carlstadt, 112 N.J. 593, 549 A.2d 38, 43, 45 (1988). The Court in that case specifically ruled that "One thing is certain: the methodology for resolving the question is not simply to deduct the cost of the clean-up from a putative value of the property. That would reflect only the cost accounting practices of the current owners." Such a 'dollar-for-dollar' reduction is also frowned on by the Standard. (E5:10).

The Taxpayer's Appraiser, in his Summary Appraisal Report, contends that the actual or fair market value of the subject property as of the assessment date is zero. (E2:43). This conclusion is based on two assumptions: first, that there is a dollar-for-dollar reduction in the value of the property by the amount of all of the costs of remediation; and second, that all of the capital costs should be deducted in the first year.

Taxpayer's Appraiser made no attempt to justify the use of a dollar-for-dollar reduction in the value for the costs of remediation. The only evidence of the costs is the breakdown shown on page 24 of Exhibit 12. The Vadose Zone Remediation capital costs are $467,000, and Operation and Maintenance costs are $65,000 per year. The Plan establishes however, that the "majority of vadose zone remediation will be complete within 2 to 3 years." (E12:13). The vadose zone remediation will eliminate the "point source" of the groundwater contamination. (Title 118, Nebr. Admin. Code, Chapter 1, Section 019). These costs must be considered in determining the impact of contamination. But nothing in the record establishes that a dollar for dollar reduction for these costs should be made against the unimpaired value.

The remaining costs are for Groundwater Remediation and Groundwater Monitoring which have not been approved by the NDEQ, and for "Institutional Controls." (E12:24). The Taxpayer's own evidence alleges that "We do not have an immediate goal of implementing a remediation plan which will achieve 5 ppb in all areas of the plume." (E8:1). If the Taxpayer does not plan on meeting the criteria of Title 118, Nebr. Admin. Code, Chapter 4, Section 2, then why should the costs for groundwater remediation be deducted from the value of the subject property? This statement also raises the issue of whether the Taxpayer is under orders from the NDEQ to remediate the contamination. The letter from the NDEQ dated January 19, 1996 (E10),

and the letter from the NDEQ dated March 22, 1996, are from the "RAPMA Program Specialist." RAPMA is the Remedial Action Plan Monitoring Act ("the Act") found in Neb. Rev. Stat. §81-15,181, *et seq.* (Reissue 1999). Section 81-15,184 of the Act governs "[a]ny entity which **voluntarily** chooses to make application for monitoring of remedial action plans for land pollution or water pollution . . . " (Emphasis added.). The Act in Section 6 also provides that the entity shall "Provide the department with an application fee of five thousand dollars and a participation fee of five thousand dollars. " The record does not establish whether this $10,000 is part of the "Operational Costs" which the Grain Co-op reimburses the Taxpayer. The record also does not establish whether any or all of these costs should be accounted for in a dollar for dollar reduction of the value of the subject property.

Given the "clear and convincing" standard imposed on the Taxpayer in this case, the Commission cannot conclude that the dollar-for-dollar reduction assumption incorporated in Taxpayer's Appraiser's opinion of value is appropriate.

Taxpayer's Appraiser's second assumption is that all capital costs should be charged off in the first year. The Taxpayer's Treasurer testified that as of January 1, 1998, the assessment date, no remediation efforts had been undertaken. It is logical to conclude under these circumstances that no capital improvements had been made in 1997. These costs are, therefore, speculative as of the assessment date.

Furthermore, Taxpayer's Appraiser also offers no reasons why the entire amount of capital improvements should be charged off in one year. A "capital expenditure" is defined under professionally accepted mass appraisal methods as "Cash investments to acquire or improve an asset that will have a life of more than one year; as distinguished from cash outflows

for expense items normally considered as part of the current operations." *Glossary for Property Appraisal and Assessment, p. 20.*

E.
CREDIBILITY OF THE SUMMARY APPRAISAL REPORT

The Parties stipulated that the author of the Summary Appraisal Report is an expert. Ordinarily, a stipulation entered by the parties to a proceeding or by their attorneys within the scope of authority for representation of the parties, establishes the fact or facts stipulated and binds the parties. *Ehlers v. Perry*, 242 Neb. 208, 218, 494 N.W.2d 325, 333 (1993) (Citations omitted). The Courts have conclusively held, however, that a stipulation does not deprive the finder of fact of its ability to weigh the evidence. *Ireland* v. *Stalbaum*, 162 Neb. 630, 634, 77 N.W.2d 155, 157 (1956) (Citations omitted). In fact, a stipulation leaves the factfinder free to consider the weight and credibility which must be accorded the stipulated evidence in the same manner as the factfinder would weight any other evidence. *Ireland, supra, at 634, 157.* The Commission, as the factfinder in this case, is specifically authorized to weigh the evidence based on its experience, technical competence and specialized knowledge. Neb. Rev. Stat. §77-5016(5) (1999 Supp.). For the reasons set forth below, the Commission cannot conclude that the Taxpayer's Appraiser is an expert as to the impact of contamination on the actual or fair market value of the subject property. This conclusion directly impacts the credibility of Taxpayer's Appraiser, and his ultimate opinion.

The Taxpayer's Appraiser's conclusions of value differs widely between Exhibits 2 and 17. These Appraisals identify two different sets of remediation costs. The first set of

remediation costs are the costs of Onsite Remediation. The Summary Appraisal Report purports to take these costs from the work plan, however there are several significant differences in the numbers. First the Soil Remediation Plan sets out the costs for a five-year remediation program. (E12:2), while the Summary Appraisal Report uses a time to complete remediation of ten years. (E2:42). The Soil Remediation Plan has an annual cost for operation and maintenance of $193,000 a year (E12:21) while the Summary Appraisal Report uses an annual maintenance cost of $105,000 a year. (E2:42). Even with the differences in the costs used by each of these documents the total costs for the onsite remediation are approximately the same for each: $2.3 million. (E2:42, E12:2). The Summary Appraisal Report also considers costs for "offsite downgradient treatment" which the work plan does not include. The costs for offsite downgradient treatment found in the Summary Appraisal Report are not contained in any of the engineering reports provided by the Taxpayer. Taxpayer's Appraiser testified that he did not know where the Offsite Downgradient Treatment numbers came from, and that they were not in the reports. Again, the Taxpayer's treasurer testified that no remediation efforts had been undertaken as of the assessment date. Therefore all of these costs are speculative.

The Taxpayer's Appraiser lacks training, education, and experience in the valuation of contaminated properties. The weight to be accorded to an expert's opinion has been the subject of several decisions. "It is well established that the value of the opinion of an expert witness is no stronger than the facts upon which it is based." *Bottorf v. Clay Cty. Bd. Of Equal.*, 7 Neb. App. 162, 167, 580 N.W.2d 561, 565 (1998). The Commission, under these circumstances, finds and determines that the Taxpayer's Appraiser's opinions of the impact of contamination on actual or fair market value of the subject property as of the assessment date as set forth in

Exhibits 2 and 17 are not credible. Since this evidence is Taxpayer's only evidence of the impact on value, Taxpayer's argument must fail.

F.
VALUE IN USE OF THE SUBJECT PROPERTY

Taxpayer's Appraiser's opinion that the subject property has no value as of the assessment date also flies in the face of professionally accepted mass appraisal methods. Section 4.1 of the IAAO Standard on the Valuation of Property Affected by Environmental Contamination (E5) states:

> "Two concepts of value that must be considered in reference to environmentally distressed property are the unencumbered value and the value in use of the property.
>
> "The unencumbered value is the value that the property would have if no adjustment were made for any environmental encumbrance. This value can be obtained using standard appraisal methods. There is a tendency to discount this value based on costs related to remediating or isolating the environmental contamination. Fully deducting the costs may overstate the decline in value, because the value in use concept would then be ignored. Value in use suggests that a property which is still in use, or which can be used in the near future, has a value to the owner. This

> would be true even if costs to cure environmental problems exceed the nominal, unencumbered value. The value in use will most nearly reflect the market value of the property."

Section 7.4 of the IAAO Standard discusses the intrinsic value of property and states that "If the property can be used, value must exist. With use comes market demand, at least in some point in time."

The uncontroverted evidence in this case establishes that the subject property has value in use. Its highest and best use is as a grain elevator according to the Taxpayer's own expert. (E2:5). The property is currently being put to its highest and best use, and was so used as of the assessment date. The subject property is also generating income. The Standard dictates that under these circumstances the subject property has a positive value. (E5:10).

Taxpayer offered three Exhibits: a Put Through Agreement (E3); an Escrow Agreement (E6); and a Purchase Agreement (E7). The Put Through Agreement allows the Grain Co-op the "exclusive right to put through its grains seeds, feeds, and similar commodities at [Taxpayer's] facilities on the Property." (E3:1). In return for this exclusive right the Grain Co-op pays a "fee equal to three-quarters of one (.75) cent per bushel of grain loaded out" by Taxpayer. (E3:1 - 2). The minimum "fee" is $10,833.33 per month, and this amount is automatically paid to Taxpayer on or before the first of each calendar month. An additional "fee" of three-quarters of one (.75) cent per bushel of grain loaded out is paid at the end of the year if the number of bushels loaded out exceeded 17,333,333 bushels in that year. (E3:2). The Grain Co-op also is required to pay Taxpayer $61,211.27 at the execution of the Put Through Agreement for "reimbursement for improvements made upon the Property by" Taxpayer , and reimburse Taxpayer for all

"reasonable Operating Costs" incurred by the Taxpayer. (E3:3). Taxpayer testified that all reasonable operating costs included all direct costs such as employee salaries, utilities, insurance, taxes and a certain amount each month to cover administrative costs incurred by the Taxpayer. This Put Through Agreement has an initial term of five years, (E3:1) and has five one-year extension periods exercisable at the Grain Co-op's option. (E3:5). The Grain Co-op also has the right to purchase the subject property at any time during the life of the agreement for an additional payment of $1,700,000. (E3:5). All payments made to Taxpayer under the Put Through Agreement for the put through of commodities are deposited in escrow pursuant to the Escrow Agreement (E3:2). The Put Through agreement is not effective unless the closing set forth in the Purchase Agreement takes place. (E3:6). That the Commission therefore infers that the purchase referred to is the purchase of the 27 grain elevators by the Grain Co-op from the Taxpayer.

The Escrow agreement offered as Exhibit 6 is between the Taxpayer, the Grain Co-op and an escrow agent. The Escrow Agreement calls for the net proceeds from the sale under the Purchase Agreement and a portion of the payments under the Put Through Agreement to be deposited in escrow. The funds deposited in escrow are to provide for the payment of the costs of implementing the Soil Remediation Plan submitted as Exhibit 12. (E6:2). As set forth in the Escrow Agreement, the Escrow Agreement is not effective until the closing occurs under the Purchase Agreement. (E6:1).

The Purchase Agreement offered as Exhibit 7 concerns the sale of 6 parcels of real estate by the Taxpayer to the Grain Co-op. The subject property is not included in that Purchase Agreement. The subject property is not freely transferable by Taxpayer under the Put Through

Agreement. (E3). The testimony establishes that the subject property is an integral part of the Grain Co-op's operations. The subject property handles grain from six elevators belonging to the Grain Co-op which were previously owned by Taxpayer. The record establishes that prior to the sale of the elevators set forth in the Purchase Agreement, the sold elevators collected grain that was then shipped to the subject property for storage and "put through" to other final destinations.

What is clear from the record is that the Put Through Agreement and the related agreements essentially operate as a lease of the subject property from the Taxpayer to the Grain Co-op. These agreements allow the Grain Co-op to operate the subject property and the six elevators as they were operated prior to the sale, with the exception that Grain Co-op has control over the elevators it services; where the grain will be shipped; and at what price.

The record must also be considered in light of the rental income for the subject property. The Summary Appraisal Report states that the "market rent" for grain "put through" a grain elevator is from $.05 to $.10 per bushel. (E2:35). Under the Put Through Agreement the Grain Co-op is paying $.0075 per bushel put through the subject property, far below the "market rent." The clear effect of this Agreement is that the operation of the subject property is "a wash" for the Taxpayer. The funds received by the Taxpayer pay the remediation costs, which directly reduce the Taxpayer's liability for the property under the applicable provisions of Federal Environmental Protection Agency Rules and Regulations (Title 42 U.S.C. Section 9601, et seq.) and the Rules and Regulations of the Nebraska Department of Environmental Quality (Title 118, Nebr. Admin. Code, et al.).

H.
VALUATION OF THE VACANT PARCEL

Neither party made the transcript of the proceedings before the County Board of Equalization a part of the record in this case. Ordinarily, that transcript is not necessary. However, in this case two parcels of real property were to be addressed by the County. The Property Record Card demonstrates that the 1994 value of the land component for the improved property was $114,265, and that the 1994 value of the improvements component of that property was $1,757,520. (E15:1). There is no amount shown as the proposed value of the subject property as determined by the Assessor for tax year 1998. The only value shown for 1998 is $119,980 for the land component and $880,020 for the improvements. This amount totals $1,000,000. This value is clearly the value after the County action.

The record does not establish, however, what action, if any, the County took regarding the assessed value of the vacant parcel. (E16:1, 5). It is a well settled principle of law that a County which has failed to act on a protest within the time allotted by statute is deemed to have denied the protest. *Sumner v. Colfax*, 14 Neb. 524 (1883). The Property Record Card shows that the 1998 value of the vacant parcel was $72,415. (E16:1). The only value shown on the Property Record Card for tax year 1998 for the improved property is that value determined by the Assessor. The values arrived at for this parcel were derived using agricultural land values. (E16:4). The Commission must therefore infer from the limited record before it that the County, after the protest, determined that the actual or fair market value was $72,415 for the vacant parcel. This interpretation finds support in the fact that the Taxpayer's Appraiser determined that the value of the land component of the vacant parcel under the Cost Approach was $6,000 per

acre, or $331,000, if unimpaired. (E2:8). The County has the same land valued at $72,415. (E16:1).

I.
CONCLUSION

The Taxpayer's only evidence of value are the appraisals found in Exhibits 2 and 17. These conclusion of value found are not credible. The record is clear that the subject land and the groundwater is contaminated, but the Taxpayer has failed to offer credible evidence of the impact on actual or fair market value of that contamination. The record demonstrates that the County reduced the assessed value of the improved parcel by $965,375. In the absence of the transcript, the Commission must infer that the basis of this reduction was the contamination. From the entire record before it, the Commission must find and conclude that the Taxpayer has failed to demonstrate that the decision of the County was unreasonable and arbitrary. The Taxpayer has also failed to adduce credible evidence of the impact of carbon tetrachloride contamination on the actual or fair market value of the subject property. The Commission must therefore find and determine that the decision of the County should be affirmed as required by *US Ecology v. Boyd County, supra.*

IV.
CONCLUSIONS OF LAW

A.
JURISDICTION

Jurisdiction of the Tax Equalization and Review Commission is set forth in Neb. Rev. Stat. §77-5007 (1999 Supp.).

B.
STANDARD OF REVIEW

The Commission is required by Neb. Rev. Stat. §77-1511 (Reissue 1996) to affirm the decision of the County unless evidence is adduced establishing that the action of the County was unreasonable or arbitrary. Neb. Rev. Stat. §77-1511 (Reissue 1996). The Nebraska Court of Appeals, in interpreting this statute, has held that "There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence on appeal to the contrary. From that point on, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board." *US Ecology, Inc. v. Boyd County Bd of Equalization*, 256 Neb. 7, 15, 588 N.W.2d 575, 581 (1999).

"In an appeal to the county board of equalization or to the district court, and from the district court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing

evidence that the valuation placed upon his property when compared to valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment." *US Ecology, Inc. v. Boyd County Bd of Equalization*, 256 Neb. 7, 15, 588 N.W.2d 575, 581 (1999).

C.
SUBSTANTIVE CONCLUSIONS OF LAW

The Commission, from the entire record before it, concludes as a matter of law that it has jurisdiction over both the parties and the subject matter of this appeal. The Commission further concludes as a matter of law that Taxpayer has not met its burden of proof as required by *US Ecology, supra.* The Commission must therefore conclude that the decision of the Adams County Board of Equalization must be affirmed.

V.
ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That the decision of the Adams County Board of Equalization which granted Taxpayers' protest in part is affirmed.
2. That Taxpayer's commercial real property known as the N ½ N & W of RR Except. 23 - 7 - 10 Denver TWP, known as Elevator Site & Highway Frontage, in Section 23, Township 7, Range 10, consisting of approximately 22.09 acres, in Adams County,

Nebraska, more commonly known as the Garvey Elevator, shall be valued as follows for tax year 1998:

Land	$ 119,980
Improvements	$ 880,020
Total	$1,000,000

3. That Taxpayer's commercial real property legally described as the N ½ N & W of RR with Except. 23 - 7 - 10 Denver TWP, Excludes Elevator Site, in Section 23, Township 7, Range 10, consisting of approximately 83.82 acres, in Adams County, Nebraska, known as the "vacant parcel,"shall be valued as follows for tax year 1998:

Land	$72,415
Improvements	$ 0
Total	$72,415

4. That this decision, if no appeal is filed, shall be certified to the Adams County Treasurer, and the Adams County Assessor, pursuant to Neb. Rev. Stat. §77-1511 (Reissue 1996).

5. That this decision shall only be applicable to tax year 1998.

6. That each party is to bear its own costs in this matter.

IT IS SO ORDERED.

Dated this 8th day of February, 2000.